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No. 79-1320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
A Delaware Corporation,
Appellee.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE APPELLEE

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ISSUE PRESENTED

Was It Error For The District Court To Make Findings Of Fact?

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BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE[1]

The 65-foot twin is a standard vehicle for interstate transportation of general commodity freight.[2] General commodity carriers, such as Appellee Consolidated Freightways,[3] offer services throughout the country and serve many communities by interchanging equipment with other carriers. Twins offer distinct operating advantages in the carriage of general commodity

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1. Following the *Manual for Complex Litigation*, the District Court's Pretrial Order required the parties to prepare detailed statements of all facts to be proven at trial. Many facts are admitted in the joint statement of facts. For the convenience of the Court, all the evidence is indexed to these pretrial factual statements in Document No. 58. Indices by witness name are also available in Court Exhibit 1, Document No. 55.

2. A. 22, 58, 245, 277, 603; As in the District Court's opinion, reference to twins or twin trailers will be to 65-foot twin trailers, unless a different length is so identified.

3. Consolidated Freightways Corporation of Delaware, hereafter "CF."

freight including more rapid and flexible service, reduced cross-dock handling, reduced exposure of freight to damage or loss, improved fuel efficiency, and improved service to smaller towns.[4] The low density, high value cargo normally carried by common carriers is particularly suited to twin trailer operations, and there is no rail competition for the cargo involved.[5]

At the commencement of this action, 33 states permitted the operation of 65-foot twins.[6] With the exception of Iowa, those states prohibiting 65-foot twins are located in the East or Southeast. Though 17 Eastern states prohibit twins, Iowa is the only state that limits twins to 60 feet, and the only state in the region that prohibits 65-foot twins.[7] The odd-sized trailer of the 60-foot twin cannot be interchanged. (A. 23, 276-277)

As a result of Iowa's ban, East-West traffic that would normally cross Iowa via Interstate 80 is diverted through northern Missouri via U.S. 36, predominantly a two-lane highway. The ban forces North-South traffic to either be diverted or moved in semis through Iowa. Traffic originating and terminating in Iowa, other than in border cities, must be moved in semis or shuttled in twins singly between Iowa terminals and staging areas at Iowa's borders.

4. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 432 n. 1 (1978).

5. In its amicus brief, the Association of American Railroads argues that railroads compete directly for the traffic involved. The record, including a survey of AAR members, flatly contradicts this statement. (A. 601; Tr. 847-848; CF Ex. 2, pp. 127-138, Tr. 107-108)

6. Appellants have included a recent AASHTO (American Association of State Highway and Transportation Officials) chart which purports to show state size restrictions. (A. 645) The chart is in error as it omits administrative rules, turnpike regulations, and annual permits under which 65-foot twins routinely operate in various states, e.g., Wisconsin and Montana. (A. 605; Tr. 252) AASHTO's recommended length standard is 55 feet for semis and 65 feet for twins. (A. 603)

7. The map at page 605 of the Appendix is a substitute for the exhibit at trial because of the unavailability of copies. The sole pertinent difference is the effective date and the inclusion of Iowa as a 65-foot twin state, as a result of the decision below.

Iowa's unique length limit on twins results in delays, increased exposure of cargo to damage, and increased costs of operation. The unnecessary vehicle miles caused by the ban mean:

> ". . . [A] greater overall exposure to accidents and fatalities. More miles of highway are subjected to wear. More fuel is consumed and greater transportation costs are incurred." 475 F. Supp. 544, 550 (J.S. 24a).

Interstate highways in Iowa present no unique circumstances requiring limitation of traffic due to congestion or deterioration. (A. 444-446, 632) The addition of 65-foot twins on the Interstate highways in Iowa would have no discernible effect on the highways' excellent level of service. (A. 632-635) Because of their axle spacing, twins cause substantially less roadwear than semis on the pavement predominantly involved. (A. 596-598, 615-616)

The District Court concluded:

> "The evidence convincingly, if not overwhelmingly, establishes that the 65 foot twin is as safe as, if not safer than, the 60 foot twin and the 55 foot semi." 475 F. Supp. 544, 548 (J.S. 21a).

Appellants were unable to produce a single witness who would state an opinion as to the overall safety of 65-foot twins as opposed to other large commercial vehicles.[8]

Appellants made three main arguments: (1) the safety evidence was inconclusive; (2) some characteristics of the twin were less desirable than the semi; and (3) even if the twin were as safe as the semi, Iowa had the prerogative to divert twins in order to reduce truck traffic through Iowa. They also argued that the burden was insubstantial by comparison to increasing costs in the motor carrier industry.

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8. 475 F. Supp. 544, 549 (J.S. 21a); see, e.g., A. 270.

The District Court rejected each of these defenses, specifically holding the evidence of 65-foot twin safety to be conclusive. The District Court evaluated all safety characteristics in reaching its conclusion. Appellants' "diversion" argument was rejected as a local purpose of little weight in the balancing process, since the diversion merely shifted interstate traffic to other states, increasing overall mileage and, thus, increasing the number of accidents, injuries, and fatalities associated with the traffic. It also noted that, based on 1974 carrier operating costs as estimated by the Iowa DOT, the burden on all carriers amounted to at least $12,644,000 annually, and the Appellants' efforts to show the monetary burden to be inconsequential were inappropriate. 475 F. Supp. 544, 547 n. 2 (J.S. 18a).

On appeal, Appellants presented two arguments: (1) the District Court erred in failing to defer to the Iowa Legislature once a "colorable" safety justification was shown, and (2) "by prohibiting traffic that might otherwise flow through the state, Iowa's law promotes legitimate local safety interests." 612 F.2d 1064, 1068 (J.S. 5a-6a).

The Court of Appeals rejected Appellants' arguments. It agreed that the proper issue was overall safety and found the District Court's conclusions on twin trailer safety to be well supported in the record. The Court of Appeals reaffirmed that a state may prohibit an unsafe vehicle, even if it were permitted by other states, but tersely disapproved the argument that Iowa could properly divert traffic to other states to reduce accidents in Iowa. The Court of Appeals noted that, where the local safety advantages are not gained directly by banning an unsafe vehicle but indirectly by harming a larger "countervailing safety interest in other states," a balancing favoring interstate commerce[9] is "automatic." 612 F.2d 1064, 1069-70 (J.S. 9a-10a).

The Court of Appeals also pointed to Iowa's numerous size and weight exemptions as undercutting Appellants' safety claim, even if not directly discriminatory. 612 F.2d 1064, 1070 (J.S. 10a).

9. Amicus AAR has chosen to misinterpret this portion of the Appellate

. . . (Continued on Page 5)

SUMMARY OF ARGUMENT

This Court has abandoned Commerce Clause tests for constitutionality which are predicted on sovereignty concepts. Such tests are not functional and unduly restrict state regulation of interstate commerce. The *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), balancing test used in their stead has been applied to resolve conflicting state and local interests.

The *Pike* balancing test is appropriate in cases involving safety regulations, but it should be applied with two corollaries: (1) certain state regulations should be accorded a strong presumption of validity, and (2) the courts should not judge whether the economic costs of a regulation promoting safety are greater than the safety benefits.

The strong presumption of validity should only be accorded in those cases where it protects the safety interests. Its purpose is to protect safety, not state regulations.

In *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978), this Court suggested that the strong presumption of validity is accorded on the basis of sovereignty concepts; safety, particularly highway safety, is a field peculiarly local. That suggestion is inappropriate. Safety, and especially the safety of interstate commerce, is imbued with national as well as state interest. Moreover, the national interest in the safety of interstate commerce and the state's interest in local safety may conflict. Because of that conflict, and because of the numerous other economic, social, and political considerations present in legislative decisions, state determinations of whether a regulation promotes safety cannot be relied upon and should not be deferred to.

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9. . . . (Continued from Page 4)

Court's decision as a balance between Iowa's safety interest and the nation's economic interest. A review of the decision shows the Appellate Court was including the safety interests of surrounding states as part of the dominant national interest. 612 F.2d 1064, 1070 (J.S. 10a).

The strong presumption of validity should be accorded where its presence promotes safety. It should be given to state regulations whose effects on safety can only be positive or, at worst, neutral. In those cases, however, where the state regulation may either promote or harm safety, the strong presumption of validity should not be accorded. To accord it in such a case is as likely to harm safety as promote it.

The differentiation explains the seemingly inconsistent reasoning of this Court in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I.&P.R. Co.*, 393 U.S. 129 (1968), and *Raymond*. On the facts as presented, *Brotherhood* and *Raymond* were cases where the regulation either promoted safety or had no effect on it. The regulations could not harm safety. The strong presumption of validity was properly accorded to the state regulation. In *Southern Pacific*, however, if the Arizona train length law were ineffective in reducing slack coupling accidents, or if those accidents were unimportant, it harmed safety. Shorter trains meant more trains, and more trains, more accidents. In such a case, no strong presumption of validity was accorded. Instead, the court judged the total effect on safety, free of any presumption save the normal presumption of constitutionality.

This case is like *Southern Pacific*. If 65-foot twins are safe vehicles, Iowa's ban increases the number of accidents associated with interstate traffic by increasing vehicle miles. Use of the strong presumption of validity is inappropriate. The trial court should have judged from the facts the total effect on safety, without the strong presumption of validity.

Regardless of the test used, the facts in this case are conclusive. Even after according the state the strong presumption of validity, the trial court found the evidence of 65-foot twin trailer safety to be conclusive. That decision is, in effect, concurred in by Iowa, as it permits the operation of 65-foot twins where they benefit local interests and where interstate through traffic can be avoided.

Because of the strength of the factual case, Appellants are forced to argue their case on the basis of presumptions, contending that the presumptions should have foreclosed the trial court from reviewing the facts. That argument is faulty. The presumptions are contradicted by the facts, and Appellants cannot offer valid reasons for ignoring the contradictions.

Iowa's ban imposes a significant economic burden on interstate commerce. Moreover, it makes that commerce more hazardous. It gains no local benefit save that achieved by diverting traffic to other states. It thus cannot be sustained under the Commerce Clause.

ARGUMENT

I. CONTROLLING CONSTITUTIONAL CONSIDERATIONS.

A. The Commerce Clause Provides Federal Supremacy Over Interstate Commerce.

Since the inception of this nation, there has existed an inherent conflict between national and state regulation of commerce. Dissatisfaction with individual state regulation led directly to the Constitutional Convention and the adoption of the Commerce Clause.[10] The Commerce Clause preempted state action where Congress had acted, but left open the more difficult question of whether and to what extent the states could regulate interstate commerce in the absence of Congressional action.

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10. "The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was 'to take into consideration the trade of the United States; to examine the relative situations and trade of the said states; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony' and for that purpose the General Assembly of Virginia in January of 1786 named commissioners and proposed their meeting with those from other States. Documents, Formation of the Union, 12 H. Docs., 69th Cong., 1st Sess., p. 38." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949); see also THE FEDERALIST, NO. XLII.

By ratifying the Constitution, the states surrendered to the federal government the power to regulate interstate commerce. Thereafter, any state regulation of interstate commerce was at the sufferance of the federal government. The willingness of the states to delegate that power was not the result of strong federal sentiment, rather it stemmed from a pragmatic recognition that individual states can and will interfere with commerce to gain local advantage.[11] The Commerce Clause thus not only provided uniformity in regulation, it protected each state from its sister state. This Court has repeatedly held that even absent Congressional action, the Commerce Clause restrains state powers over interstate commerce and makes them subordinate to the interests of the nation as a whole.[12]

Our federal system, however, derives many of its advantages from diffusion of power, the ability of local governments to respond to local concerns and the possibility of experimentation to develop new methods of solving problems.[13] In numerous instances, state regulation of interstate commerce is desirable. If the evils of disparate regulation can be avoided, the benefits of local regulation are obvious. Thus, the consistent problem

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11. "No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished . . . The states were quite content with their several and diverse controls over most matters but, as Madison has indicated, 'want of a general power over Commerce led to an exercise of this power separately, by the States, which not only proved abortive, but engendered rival, conflicting and angry regulations.' 3 Farrand, Records of the Federal Convention 547." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534 (1949).

12. "For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interest." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

13. Indeed, 65-foot twins have developed as a vehicle to solve the problems of low density, high value, small cargo shipments. The diversity of state regulation allowed the original twin trailer operations in the 1940s, from which the standard 65-foot twin evolved in the late 1950s. (A. 43-44, 94, 378)

approached in interpretation of the Commerce Clause has been how to permit state regulation while preserving the national policies from its possible harms.

B. The Necessary Balancing In Commerce Clause Cases Is Between The Competing Interests, Not Between Definitions Of Sovereign Power.

Prior to use of the balancing test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), legal attempts to delineate the scope of permissible state regulation were based on definitions of sovereign power within the federal system. Historically, two tests were developed based on definitions of relative sovereignties: the "local - national" subject matter test, and the "direct - indirect" regulation test. Neither test proved satisfactory. The tests resulted in either inconsistent decisions or the piecemeal demise of state regulation.

The "local - national" test was first enunciated in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). As outlined in *Cooley*, the court first determines whether the subject matter area is principally local or national in nature. If local, the state regulation prevails; if national, the federal government has exclusive power. The test was not successful because in the same subject matter area different factual situations could be presented in which the national interests vary from minimal to significant. To protect the significant national interest, the subject matter approach had to prohibit all state regulation of the subject matter. Reasonable state regulation was prohibited or consistency in labeling subject matter areas was sacrificed.[14]

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14. Compare, *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851), striking down, in part on Commerce Clause grounds, a bridge which interfered with interstate river traffic, with *Escanaba and Lake Michigan Transportation Company v. Chicago*, 107 U.S. 678 (1883), upholding an ordinance which prohibited the bridge opening despite interference with interstate river traffic. Compare also, *Hughes v. Oklahoma*, 441 U.S. 322 (1979) with *Geer v. Connecticut*, 161 U.S. 519 (1896) and *Lacoste v. Department of Conservation*, 263 U.S. 545 (1924).

The "direct - indirect" dichotomy once used by this Court suffers similar difficulties. It rests on the proposition that some state regulation of interstate commerce is merely incidental to regulation of other matters within the sovereignty of the state. Such incidental regulation is therefore permissible. An incidental burden, however, may be so great a practical burden as to seriously impede national interests. Moreover, the approach prohibits any direct regulation of interstate commerce that may well promote national interests.

Neither test which attempts to delineate between permissible and impermissible state regulation based on definitions of respective sovereignties has been successful in answering the underlying question: Does the local purpose provide sufficient justification for the burden imposed on commerce? The balancing test outlined in *Pike* focuses on the actual interests involved, thereby producing sufficient flexibility to accommodate the myriad of factual situations possible. By limiting state regulation only when the nation's interests outweigh local interests, it provides the widest latitude for state action.[15]

A careful definition of what is being balanced is important, for it directly affects the nature of the special presumption of validity accorded state regulations in the area of health and safety.

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15. Though this Court has abandoned the "local-national" and "direct-indirect" tests, it somewhat confusingly continues to use the terms. Thus, in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) and *Raymond*, there is language that speaks in terms of "local-national" subject matter. Analysis of all the recent decisions of the Court will show, however, that the *Pike* standard is continually applied in practice. The terms "local-national," as with "direct-indirect," become little more than descriptions of the final balance reached:

> "In thus making use of the expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached." *DiSanto v. Pennsylvania*, 273 U.S. 34, 44 (1927) (Justice Stone dissenting).

C. The Primacy Of The Safety Interest Controls The Special Considerations Afforded State Safety Regulations.

This Court has shown special consideration for safety in two distinct ways. First, certain safety regulations enjoy a "strong presumption of validity." Second, the courts will not, save in the extreme case, balance safety interests and economic interest. If that balance is to be made, it is a matter of policy to be decided by a legislature, state or federal. In the absence of a political decision, the courts will automatically grant priority to the safety interest.

The Strong Presumption of Validity. This Court, however, has not offered clear guidance as to when the "strong presumption of validity" attaches. Analysis of the purpose of the presumption is necessary to determine when it should attach and its proper scope.

In *Raymond, supra*, this Court suggested that the presumption attaches because of the state's sovereignty in this area:

> "Nevertheless, it also is true that the Court has been most reluctant to invalidate under the Commerce Clause 'state legislation in the field of safety where the propriety of local regulation has long been recognized.' Pike v. Bruce Church, Inc., supra, at 143, 25 L Ed 2d 174, 90 S Ct 844, quoting Southern Pacific Co. v Arizona ex rel. Sullivan, supra, at 796, 89 L Ed 1915, 65 S Ct 1515 (Douglas, J., dissenting)." 434 U.S. 429, 443.

The suggestion that sovereignty is the predicate of the presumption may, in part, result from the fact that the language describing the presumption predates the *Pike* balancing test. According the presumption for the purpose of protecting sovereignty concepts, however, suffers from the same logical difficulties and lack of utility as did the Commerce Clause tests based on sovereignty.

Safety, and particularly the safety of interstate commerce, is not a field exclusively involving state interests. The nation's interest in the safety of interstate commerce is at least as great as its interest in the economic efficiency of the commerce. Congress may preempt state regulations in this field if it desires. Even in the absence of Congressional action, there may be conflicts between local safety interests and national safety interests in which the national interest should prevail.

Nor can it be contended that deference to the state legislative judgment necessitates the granting of the presumption. If there is a conflict between national and state safety interests, the state is peculiarly ill-suited to resolve that conflict.

> "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that imbodies what the Commerce Clause was meant to end." Holmes, "Law and the Court," Collected Legal Papers, 295-296.

Even absent such a direct conflict, a legislature is a poorly constituted body to make a factual judgment as to whether or not a regulation promotes safety. Rarely is the issue presented to the legislature purely in terms of safety. The very factors that make the legislature the only body able to determine whether the economic costs outweigh the safety costs prejudice the legislature's factual judgment as to safety. Interests other than safety are inextricably intertwined in the legislative process. To what extent was Arizona's train length law based on safety grounds, and to what extent based on increasing employment for Arizona train crewmen?[16] To what extent was Illinois' mudflap law based on the safety of the mudflaps, and to what extent on the political influence of the local manufacturer of the device?[17]

16. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).
17. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

Even in this case Appellants suggest that the principal factors in Iowa's safety determination of the length of trucks are the editorial policy of an influential newspaper, and the political power of a narrow interest group.[18]

We do not suggest that the state regulation should never be accorded a strong presumption of validity because of the presence of these political factors. We do suggest that the presumption should not be accorded on the basis of an assumption that the legislature has made an objective determination of the safety aspects of the regulation.[19] The purpose of the strong presumption of validity is not to preserve state legislative acts. The normal presumption of constitutionality achieves that purpose. The purpose of the strong presumption of validity is to ensure that judicial decisions in the Commerce Clause area do not jeopardize safety interests. The strong presumption should be accorded on the basis of how the safety interest appears in the case.

Attaching the strong presumption of validity to the safety regulation insures that if the trial court errs, it errs on the side of safety. Such a cautious approach is often possible. In the normal case, if effective, the state regulation will promote safety; if ineffective, it will do no harm to safety. A plaintiff, who challenges a regulation which can only promote safety or be ineffective, must prove by a strong factual case that the regulation is ineffective.

That approach was possible in *Raymond*. On the facts as presented, Wisconsin's regulation banning 65-foot twins either

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18. Appellants' Br. 23. (A. 276; see also, 500-502)

19. This Court has also suggested that the state legislature has a significant expertise in the highway area because the facts bearing on roads vary from locality to locality. *Raymond v. Rice*, 434 U.S. 429, 444 n. 18 (1978). But that is true in almost any Commerce Clause case. Local interests vary from the national interests because of local factors. Moreover, the idea of geographical variation becomes questionable when the highways involved are Interstate highways built to federal design and construction standards with local variation at a minimum.

promoted safety or was ineffective.[20] It was properly accorded a strong presumption of validity. Plaintiffs produced a factual case sufficient to overcome the strong presumption of validity. Similarly, in *Brotherhood*[21], the Arkansas train crew law was a regulation that also could only promote safety. The requirement of extra train crew members could only reduce the number of train accidents. It could not increase them.[22] In that case, the evidence of ineffectiveness was not convincing and could not overcome the strong presumption of validity.[23]

But a cautious approach is not always possible. Not all state regulations are either supportive of safety or merely ineffective. Some safety regulations, if ineffective, create hazard. In *Southern Pacific*,[24] the state regulation limiting train length purportedly promoted safety by reducing slack coupling accidents. If it was ineffective in doing so, however, or if slack coupling accidents were relatively unimportant, the regulation created hazard. Shorter trains meant more trains, and more trains inarguably increased the number of train accidents, not just in Arizona but in surrounding states as well. In reviewing the facts, this Court did not give the Arizona regulation a strong presumption of validity. Rather, it reviewed the record to determine the overall effect on safety.[25]

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20. A case could have been presented that Wisconsin's ban detracted from safety but was never fully developed. The onus of footnote 25 in *Raymond* must be shared equally by counsel on both sides.

21. *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad*, 393 U.S. 129 (1968).

22. There is a marginal suggestion of an increase in hazard because the increase in crewmen might result in more injuries to the crew in an accident, but the facts supporting the argument were apparently never developed. *Chicago, Rock Island & Pacific Railroad v. Hardin*, 274 F. Supp. 294 (W.D. Ark. 1967).

23. The trial court opinion suggests that there might be some incremental safety advantage to additional crewmen. The trial court improperly compared that safety advantage with the economic burden.

24. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

25. "The trial court found that the Arizona law had no reasonable relation to safety, and made train operation more dangerous. Examination of the

. . . (Continued on Page 15)

A different analysis, as suggested by *Southern Pacific*, is necessary when confronted with a state regulation which may as easily harm safety as promote it. Certainly the regulation is entitled to a presumption of constitutionality. But the strong presumption of validity, referred to in *Bibb* and *Raymond*, should attach only to regulations whose only possible effect on safety is positive. If that presumption were given to a regulation which may actively harm safety, the presumption may lead to a decision which harms safety, thus undermining the very purpose for allowing the presumption.[26]

Where the regulation is shown to carry the potential for adverse effects on safety, it is incumbent upon the trial court to judge from the facts, free from any but the normal presumption of constitutionality, whether the regulation actually promotes overall safety. The trial court must determine the "total effect" on safety. The comparison in such a situation is not simply between the state's safety interest and the plaintiff's economic cost. Instead, the safety interest may appear on either side of the equation. If the equation is distorted by a strong presumption of validity, the risk is not simply the upholding of an ineffective

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25. . . . (Continued from Page 14)

evidence and the detailed findings makes it clear that this conclusion was rested on facts found which indicate that such increased danger of accident and personal injury as may result from the greater length of trains is more than offset by the increase in the number of accidents resulting from the larger number of trains when train lengths are reduced. *In considering the effect of the statute as a safety measure, therefore, the factor of controlling significance for present purposes is not whether there is basis for the conclusion of the Arizona Supreme Court [and Legislature] that the increase in length of trains beyond the statutory maximum has an adverse effect upon safety of operation.*" *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945) (Emphasis added)

26. The use of the "rational relation test" which Appellants espouse would be even more damaging in such a situation. A regulation which promotes some aspects of safety, while creating greater hazards in other aspects, will always meet the rational relation test. The problem has been implicitly recognized by this Court. *Compare*, footnote 25, supra, with *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177, 191-192 (1938).

regulation and resulting economic loss. The result may be both economic and safety losses.

Restraints On Legislative Balancing Of Costs And Safety. The balancing of safety and economic cost is a matter of public policy to be decided by a legislature, state or federal, and not by the courts.[27] This Court has consistently refused to respond to the question: How much safety at what price?

In *Brotherhood*, the district court found that the state train crew law was only minimally effective. If it promoted safety at all, it did so only slightly and the economic cost was unwarranted. This Court reversed. The question of whether safety justified the cost was a legislative issue:

> "In the absence of congressional action, however, we cannot invoke the judicial power to invalidate this judgment of the people of Arkansas and their elected representatives as to the price society should pay to promote safety in the railroad industry." 393 U.S. 129, 144.

The legislature, however, is not entirely free in its policy determination. In *Raymond*, this Court noted that Wisconsin's numerous exemptions to its length limit undercut the presumption of validity accorded to purported safety regulations. The result is appropriate, but the method of reaching it should be somewhat different. If the strong presumption is accorded because of the primary interest in safety, a state's hypocrisy should not directly affect the presumption. Whether the measure does or does not promote safety is a question of fact. The state's inconsistency does not change that factual conclusion.

However, when the policy judgment as to the economic cost of safety is made by a state legislature, it may not strike a differ-

27. "Nor was it open to the District Court to place a value on the additional safety in terms of dollars and cents, in order to see whether this value, as calculated by the court, exceeded the financial cost to the railroads." *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad*, 393 U.S. 129, 139 (1968).

ent balance for local as opposed to interstate commerce. If the state determines that a safety gain is outweighed by economic costs when the costs are borne by local interests, it must make the same determination when the costs are borne by out-of-state groups. State regulations which permit exceptions for local interests strongly suggest that the safety reasons for the regulation are actually viewed by the state as slight and outweighed by the economic burden.

D. No Strong Presumption Of Validity Should Be Accorded Iowa's Ban Of Twin Trailers.

In analyzing the case at bar, the trial court looked to *Raymond* and found it to be controlling. That was a natural reaction as much of the evidence, most of the witnesses, and many of the arguments were the same. However, though the case at bar completely incorporates the facts of *Raymond*, it goes further by showing a safety hazard arising from Iowa's ban. This case thus is more analogous to *Southern Pacific*, *supra*. In this case, as in *Southern Pacific*, the state regulation is one which, if ineffective, harms safety.

The uncontroverted evidence here is that Iowa's ban increases the number of accidents, injuries, and fatalities associated with the interstate traffic at issue. The amount of the increase is not small. The diverted traffic must travel 32% farther than the direct route through Iowa, thereby increasing the probability of accidents, injuries, and fatalities by at least 32%.[28] (A. 604) The safety hazard exists regardless of how carriers respond to Iowa's ban. If they use 55-foot semis or 60-foot twins, they must

28. This hazard is further amplified by the fact that the diversion route is over roads which are often two-lane, with at-grade intersections, and passing through congested urban areas. The two-lane sections of the diversion route have accident frequencies at least twice as high as those of the Interstate routes through Iowa. (A. 632) For CF, the Iowa regulation is conservatively estimated to produce 10 additional accidents per year. (A. 614) The Iowa DOT, considering only the extra miles and making no allowance for the less safe roads on the diversion route, estimated the annual increase in accidents caused by the ban to be 96 in 1975. (A. 584, 604)

use more vehicles to carry the cargo, thereby increasing exposure to accidents over the entire journey. Shuttling 65-foot twins through Iowa obviously doubles the exposure.

Following this Court's suggestion in *Raymond*, the trial court erroneously accorded a strong presumption of validity to Iowa's regulation. Nonetheless, the trial court found the evidence to be conclusive "if not overwhelming" in proving that 65-foot twins are as safe or safer than 60-foot twins and 55-foot semis. The state was thus allowed every benefit of the doubt.

In practice, Iowa has concurred with the District Court's determination as to the relative safety of 65-foot twins. Where it has been possible for Iowa to obtain the benefits of 65-foot twins for its citizens without permitting interstate through traffic of little or no benefit to Iowa, Iowa has had no trouble in concluding that 65-foot twins possess no safety hazards. Its own staff of experts in the area who studied the problem at the instruction of the legislature, found there to be no evidence of safety hazard in the operation of 65-foot twins. (A. 584-596) Indeed, those officials who are responsible for the existence and continuance of Iowa's ban have testified that *they have upheld the ban not because of perceived safety problems with the vehicle but out of a desire to avoid increased interstate traffic of no benefit to Iowa.*[29]

II. THE LEGAL STANDARDS PROPOSED BY APPELLANTS ARE FAULTY.

A. Appellants Substitute Discredited Presumptions For Fact.

Appellants suggest that the trial court erred in the standards it applied. The trial court, they contend, should have recognized the "legislative fact" that length limits promote safety.

29. See e.g. the Governor's veto of the 65-foot twin trailer bill. (A. 171-173, 626) The only mention of vehicle safety, as opposed to an increase in accidents because of greater traffic, is a mention of higher fatalities per accident. . . . (Continued on Page 19)

It should then have determined that the Iowa regulation was a length limit and, therefore, under the first premise, promoted safety. It should have terminated its analysis out of deference to the legislature since Plaintiff failed to show that length is never related to safety.

The same argument was presented by Wisconsin in *Raymond, supra.*[30] It is telling comparison that after a lengthy trial, Appellants must substitute a presumption for their factual case as did Wisconsin. The arguments share the same purpose: the trial court would be foreclosed from reviewing the facts because presumptions, assumptions, and deference to legislative judgment would make the facts irrelevant.

That is certainly not the lesson of *Raymond:*

> "The District Court, without mentioning this evidence, suggested that language in Morris v Duby, 274 US 135, 144, 71 L Ed 966, 47 S Ct 548 (1927) and Buck v Kuykendall, 267 US 307, 315, 69 L Ed 623, 45 S Ct 324, 38 ALR 286 (1925), established a principle 'that for purposes of judicial review of state highway legislation, size restrictions might be deemed inherently tied to public safety. . . .' 417 F Supp, at 1360. The language relied upon does not go so far, and it antedats the era of the limited-access, four-lane divided

29. . . . (Continued from page 18)
(A. 628) The reference appears to be to twins. As the Governor conceded, however, the reference is actually to large commercial vehicles generally. (A. 184) CF Exhibit 34, Appendix M, Tr. 927, contains a detailed discussion of the facts stated in the Governor's veto message. The discussion was prepared by the Iowa DOT.

30. "Wisconsin's chief concern over the safety hazards is the safety hazard posed by an extra ten feet of truck length. Length bears an obvious relation to safety. Since longer vehicles or even triple trailers might be shown to be safe, the decision as to what length to permit involves judgment and discretion. The courts should leave this decision to the legislature and should not substitute its judgment for that of the legislature." Brief for Appellees in *Raymond* at 2.

> highways involved in this case. Size restrictions, like other highway safety regulations, are entitled to a strong presumption of validity, but this presumption cannot justify a court in closing its eyes to uncontroverted evidence of record." 434 U.S. 429, 44 n. 19.

Nor is it consonant with the general principle that Commerce Clause cases require a determination of the facts by the trial court, *Great Atlantic & Pacific Tea Company v. Cottrell*, 424 U.S. 366, 372 n. 6 (1976).

The facts show that Iowa's length limit does not promote safety. The District Court found the evidence to be "conclusive" that 65-foot twins were as safe or safer than 60-foot twins or 55-foot semis. Appellants, however, argue that this factual contradiction should be ignored for two reasons.

First, they assert that the comparison is inappropriate. They assert that Plaintiff should have to prove that length limits in general never promote safety. CF does not contend that length limits never promote safety, nor does it contend that Iowa does not possess the power to impose length limits. It does contend that Iowa's prohibition of 65-foot twins is impermissible because Iowa's prohibition does not promote safety. CF has shown by massive evidence that the 65-foot twin is as safe, or safer, than the vehicles Iowa routinely permits. That comparison is proper as those vehicles are conceded to be safe and are the vehicles that Appellants suggest CF should use in lieu of 65-foot twins.

Appellants advance a second reason why the presumption should be irrebuttable. They argue that there is a grey area in which small differences in length make little difference in safety. Thus, the state may be unable to offer proof that the small difference in length affects safety. If, however, a number of cases are brought, each arguing for a slightly longer length, the end result may be a large increase in length and an impact on safety which was not discernible at each step.

It is an argument that ignores a prominent fact in this case. The 65-foot twin in this case is a standard vehicle for transportation of general commodities. That fact makes the burden of Iowa's ban great and brings the Commerce Clause into play. The 65-foot twin can be interchanged, other trailer lengths cannot. It can be used in most states, including all of the states adjoining Iowa; longer lengths cannot. As a result, the ban disrupts and fragments a national transportation system. No other twin trailer length is standard and, correspondingly, no other length can be successfully argued for. If CF were to bring a case arguing for 66-foot twins rather than 65-foot twins, the case would not be viable. Though it might be unlikely that any safety difference could be shown, it would also be impossible to show a burden on interstate commerce of the magnitude and type necessary to sustain a challenge on Commerce Clause grounds.

Appellants' own example illustrates the point. Appellants posit a challenge to Iowa's width limitation of eight feet by someone wishing to operate a vehicle 8 feet 3 inches wide, Appellants' Br 12-13. That challenge would fail because 8 feet is the near universal standard to which all large commercial vehicles are built. No burden on interstate commerce could be shown. However, if Iowa initiated a width limit of 7 feet 11 inches, the burden on interstate commerce would be massive. The safety advantage, if any, would be negligible. Presumably, the regulation would fall under a Commerce Clause challenge. The differentiating factor is the burden placed on interstate commerce. It is that factor that makes impossible the "nibbling" process feared by Appellants.[31]

31. Indeed, Appellants' argument on twins goes too far. If, in fact, there is a grey area within which there is no discernible difference in safety between the 65-foot twin, the 60-foot twin, and the 55-foot semi, Iowa's length limit becomes insupportable. Appellants' Br., 12-13, 32. No safety advantage is gained, yet interstate commerce is heavily burdened. Even considered under the test stated in *Raymond*, such a regulation must fall. See also, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-530 (1959).

B. Appellants' Claims Of Proper Deference To The State Legislature Misapprehend The Commerce Clause And The Facts Of This Case.

Appellants and Amici contend that Iowa's legislative judgment in banning 65-foot twins is entitled to great deference. That deference is defined as upholding the Iowa regulation unless it is irrational, a test derived from Due Process Clause cases. That reliance on the due process test is misplaced and misapprehends completely the Commerce Clause. The Commerce Clause and Fourteenth Amendment are not redundant.[32]

This Court will determine for itself the effects of state legislation which regulates interstate commerce.[33] Here, the effects are not contested. The twin trailer traffic affected by Iowa's ban is almost entirely interstate through traffic. (A. 175-176, 560, 582-583; Tr. 25) It is of little or no benefit to Iowa. (A. 601, 626) By forcing this traffic to divert around Iowa, Iowa achieves local benefits, notably a reduction in traffic and a corresponding decrease in congestion, roadwear, and accidents occurring in Iowa.

We do not suggest that Iowa has acted irrationally in banning twin trailers. From Iowa's viewpoint, the action is entirely rational. From that viewpoint, the local benefits of the ban far

32. "Local regulations which would pass muster under the Due Process Clause might nonetheless fail to survive other challenges to constitutionality that bring the Supremacy Clause into play. Like any local law that conflicts with federal regulatory measures, [citations omitted] state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959).

33. "This court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it interferes with or burdens interstate commerce. The name, description, or characterization given it by the legislature or the courts of the state will not necessarily control. Regard must be had to the substance of the measure rather than its form." (Citations omitted) *Lacoste v. Department of Conservation*, 263 U.S. 545, 550 (1924), quoted with approval, *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979), *semble*, *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

outweigh its local harms. Such a judgment, however, is not reviewed under substantive due process grounds or under equal protection grounds. The Commerce Clause, for entirely different reasons, prohibits such judgments by the state legislature:

> "The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that *there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state.* It was to end these practices that the commerce clause was adopted." *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177, 185-186 (1938) (citations omitted) (Emphasis added).

The record here clearly demonstrates why such judgments cannot be entrusted to the state:

> "Q. Overall, there would be fewer miles of operation, fewer accidents and fewer fatalities [if the Iowa ban were lifted]?
> A. [Director Kassel] Yes, on the national scene.
> Q. Does it not concern the Iowa Department of Transportation that banning 65-foot twins causes more accidents, more injuries and more fatalities?
> A. Do you mean outside of our state border?
> Q. Overall.
> A. Our primary concern is the citizens of Iowa and our own highway system we operate in this state." (A. 281)
>
> * * *
>
> "Q. The conclusion of your veto message in 1974 was basically that sixty-five foot twin trailers were a greater

> advantage to interests outside the State of Iowa and would not have much benefit to the interests inside the State of Iowa. Is that a correct statement of that position? position?
>
> A. [Governor Ray] I view my job as one to protect the best interest of the people of my state, and in doing so, I have to take into consideration, I think, the safety, the well-being, and the convenience of the people that live here. . . ." (A. 185-186)

The legislative judgment here is not entitled to deference. The viewpoint is too narrow, the constituency too small. Iowa is inherently incapable of properly judging its ban in a national context. To assume, as Appellants blithely do in their brief, that the legislature is determining the finest of safety differences among various vehicles, is to assume that the legislature will not recognize and act for the benefit of its constituents.

There may properly be grounds for deference to a legislative judgment where that judgment is predicated on balancing harms and benefits occurring alike to state and national interests. No deference is due where the harm is predominantly national and the benefit local.

C. The Inaction Of Congress Does Not Alter The Test To Be Applied In This Case.

The briefs of Appellants and amicus AAR have included materials relating to various congressional debates on truck size and weight limits.[34] Amicus AAR goes on to suggest that the comments of individual senators are appropriate to determine what congressional intentions are.[35] Lost in the mass of material

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34. The confusion of debates regarding vehicle length with those regarding vehicle weight appears intentional. CF seeks no weight increase in Iowa and would not generally benefit from any increase in maximum allowable weights inasmuch as the cargo space of twins is generally filled.

35. Amicus repeatedly quotes former Senators Gore and Kerr in support of its views. Comments of individual legislators are, however, not competent evidence to show the intent of Congress. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921).

is the simple, salient, and pertinent fact: "Congress has considered preempting this field, but has not acted." *Raymond v. Rice*, 434 U.S. 429, 442 n. 17 (1978). In such an instance, Congress has "left it to the courts to formulate the rules . . . interpreting the commerce clause . . ." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 770 (1945).

The suggestion that Congress has accommodated itself to the role of the Supreme Court is particularly apt here. This Court decided *Raymond* in 1978. Had Congress believed *Raymond* not to express its intent, it could have passed legislation overruling that case. It has chosen not to do so.

III. SAFETY

A. The Safety Evidence Convincingly Supports The District Court's Findings.

As this Court has reiterated, the trial court must determine the "total effect" of the law as a safety measure. *Southern Pacific*, *supra*, *Bibb*, *supra*, *and Raymond*, *supra*. The District Court found:

> "The evidence convincingly, if not over-whelmingly, established that the 65-foot twin is as safe as, if not safer than, the 60-foot twin and the 55-foot semi.
>
> * * *
>
> "Defendants claim that the evidence is inconclusive on the relative safety issue, and it is a reasonable policy decision for Iowa to make a safety distinction between twins and semis. Defendants argue that they should prevail because of the strong presumption. The Court cannot accept this argument as it believes that the evidence clearly establishes that the twin is as safe as the semi."475 F.Supp. 544, 548-549 (J.S. 21a-22a).

The Court of Appeals noted that the District Court's findings on

twin safety were "based . . . on a record replete with substantiating evidence." 612 F.2d 1064, 1069 (J.S. 8a).

The affirmative case on safety was stronger than that in *Raymond*; and the rebuttal, though full of sound and fury, was of the same type held insufficient in *Raymond*. The telling fact is that Appellants were unable to produce a single expert that took direct issue with the trial court's findings as to overall safety. 475 F. Supp. 544, 549 (J.S. 21a); 612 F.2d 1064, 1069 (J.S. 7a-8a). Neither the Appellants nor any witness presented by Appellants could or would state an opinion as to the relative overall operational safety of twins and semis.

The affirmative safety evidence included:

- A comprehensive study of 65-foot twins prepared by the Iowa Department of Transportation;
- Testimony of state, federal, and insurance officials who had actual experience with 65-foot twins;
- Engineering testimony on vehicle and highway safety characteristics;
- Accident statistics prepared by governmental agencies and a detailed analysis of CF's own statistical record; and
- An expert analysis of the relative overall safety of twins and the adverse safety effect of Iowa's ban.

The 1975 Iowa DOT Study.[36] This comprehensive study, unavailable at the time of *Raymond*, isolated and evaluated an exhaustive range of issues concerning 65-foot twins in Iowa. The study concluded, *inter alia:*

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36. The study was done at the request of the Iowa legislature. The Iowa DOT considered it objective and exhaustive. (Tr. 11-23, 70-71) Following the study, the Iowa Transportation Commission adopted a rule which would have permitted 65-foot twins in Iowa without restriction to Interstates, provided the state legislature banned studded snow tires. (A 555-556, 559-560) The rule was invalidated because of the tie to legislative action. *Motor Club of Iowa v. Department of Transportation*, 251 N.W. 2d 510 (1977).

"Sixty-five foot twin trailer combinations have *not* been shown by experiences in other states to be less safe than 60 foot twin trailer combinations *or* conventional tractor-semitrailers.

* * *

". . . In reviewing accident statistics, no figures show a significant difference in accident experience that would indicate an expected higher accident or fatality rate for 65 foot twin trailers. The analysis of maneuverability, splash and spray and aerodynamic distrubance characteristics indicated no sacrifice to safety. An in-depth analysis of Missouri's accident records likewise failed to show any significant difference in accident experience among these truck types." (A. 584-585)

The safety conclusions of the Iowa Department of Transportation were independently confirmed in a similar study in the State of Virginia in 1970.[37]

Federal, State and Insurance Officials. The federal and state officials who testified all had practical experience with the safety of large commercial vehicles. The only dispute among them was whether twins are safer than, or merely as safe as, semis:

Kenneth L. Pierson, Deputy Director, Bureau of Motor Carrier Safety, Federal Highway Administration:

"Q. What has the safety experience of the Bureau of Motor Carrier Safety been with respect to 65-foot twin trailers as opposed to tractor semitrailer combinations of 55-foot.

A. According to the data available to the Bureau, 65-foot twin combinations are as safe as, if not safer

37. The Virginia Study concluded: "Twin trailer combinations, not exceeding 65 feet in length and conforming to existing width and weight limitations, may be operated safely and efficiently on four-lane divided highways without interfering with the safety and convenience of motorists." (A. 644)

than, the standard tractor semitrailer configuration." (A. 23)

Ernest G. Cox, retired Deputy Director, Bureau of Motor Carrier Safety, Federal Highway Administration:

Q. What is that opinion?

"A. My opinion is [that it is] decidedly superior from a safety standpoint to have goods transported in a combination of two trailers with a 65 foot limitation than in a single trailer such as is possible with a 55 foot limitation." (A. 45)

Similar testimony was given by state officials.[38]

Appellants presented no testimony of any state or federal official with comparable experience with 65-foot twins and no testimony contrary to the observations of these witnesses.[39]

The Director of Safety and Engineering for Transport Indemnity Company, an insurer of large commercial vehicles, reaffirmed his previous testimony in *Raymond:*

"Q. What has the safety experience with Transport Indemnity Company been with respect to the 65-foot twin trailers as opposed to 55-foot tractor semitrailers?

38. Maj. James Adkins, Kansas Highway Patrol (A.67); Col. James Crawford, Chief, Minnesota State Patrol (A. 56); Thomas Doyle, former Director-State Engineer, Nebraska Department of Roads (A. 82-83); Col. Dennis Eisnach, Superintendent of the South Dakota Highway Patrol (A. 87-88); Edward Kynaston, Deputy Chief Commander, California Highway Patrol Enforcement Services Division (A. 50); Francis C. Marshall, Assistant Commissioner of Minnesota DOT (A. 59); Claud McCamment, Retired Director, Kansas Highway Commission (A. 74-77); and George Moberly, Engineer of Traffic, Illinois Department of Transportation (A. 62-63), Arlan Hicks, Transportation Safety Administrator, State of Kansas (A. 70).

39. Appellants produced testimony that the Kansas Turnpike Authority, a state-chartered corporation, closed to "doubles" under snow and wind conditions. Cross-examinations revealed that the purpose for this blanket closing rule under such conditions is to exclude 108-foot double semis and not 65-foot five-axle twins, the latter being excluded only as a matter of administrative convenience. (A. 230-233)

A. No difference. The doubles — we use the word doubles here on the West Coast might be slightly safer than the semis." (A. 89)

The Iowa DOT Study includes similar statements from virtually all major truck insurance carriers. (A. 594-596; CF Ex. 2, p. 77-80, Tr. 107-108)

Engineering Testimony. CF presented exhibits and experts who testified on various vehicle safety characteristics, such as braking, component reliability, structural integrity, maintenance, passing, splash and spray, turning and off-tracking, and stability.[40] The expertise of these witnesses was generally derived from their job experience, not preparation for trial, and contrasted sharply with the expertise of the defense witnesses.

CF also presented a "level of service" analysis of highways which would be affected by permitting 65-foot twins on Interstates in Iowa. Level of service analysis is a specialized field of highway safety engineering which involves application of objective standards for measuring "congestion," highway capacity, and serviceability for various traffic flows.[41] The study concluded

40. *Braking:* A 135-139; for technical details and specifications not printed in the Appendix, see deposition of George Ternent, generally, and blueprints at Ternent Depo. Ex. 1 (Depositions, deposition exhibits, and CF Ex. 71 cited hereinafter are all part of Court Exhibit 3, Tr. 1312); A. 99, 103-104, 143-144, 343-345; CF Ex. 71, pp. 6, 81. *Component reliability:* A 339-340, 342; e.g., Ternent Depo. 45-46, 131. *Maintenance:* Tr. 745-749, 769-770, 773-776, 779-784; CF Ex. 32 pp. 6-11, Tr. 927. *Passing:* A 102-103, 116, 567, 590-591; CF Ex. 71 pp. 64-75. See also footnote 49, infra. *Splash and spray:* A. 95-96, 108; Sherard Depo. Ex. 2 and 3. *Turning and off-tracking:* A. 97, 116, 585; Tr. 56-57; CF Ex. 2 pp. 61-62, Tr. 105; CF Ex. 71 pp. 6, 40. *Stability:* A. 98-99, 116-117, 149-153, 561-577, 585; CF Ex. 71 pp. 39-41, 76-81. References include "engineering" evidence, only.

41. The analysis included a field survey of Interstate 80 in Iowa and principal diversion routes around Iowa, via U.S. 36 through Missouri. The procedures are recognized by the federal government and all 50 states. (A. 386-387; Tr. 1095) For a general description of the analysis, see CF Exhibit 54, Tr. 1234 and Transcript pages 1094 to 1113. Appellant Kassel acknowledged the procedure to be a recognized standard and the qualification of the firm that prepared the analysis. (Tr. 140, 142-143) The Director of the Iowa DOT Highway Division, Mr. McLean, was essentially in agreement with the analysis of Interstate 80 in Iowa. (Compare, Tr. 1119-1120 and A. 434)

that there is less safety hazard with operation of trucks on Interstate 80 in Iowa than U.S. 36 in Missouri, even without considering the reduction in vehicle miles by operating over the more direct route through Iowa. Shifting 65-foot twins from U.S. 36 will improve conditions on that highway without imposing a measurable difference in the level of service of Interstate 80. (A. 632-635)

Statistical Studies. Eight studies were presented. Two were discounted by both CF and Appellants.[42] Two were essentially surveys of accident data conducted by Iowa DOT: one, a survey of accident records of surrounding states; the other, a survey of accident records of 15 carriers operating both twins and semis. The four principal statistical studies included:

1. A U.S. DOT Bureau of Motor Carrier Safety [BMCS] study based on eight years of data over three *billion* miles of operation, comparing relative accident, injury, and fatality rates for 65-foot twins and 55-foot semis. (A. 32-36, 586, 609)

   Twins were found to have significantly fewer accidents, injuries, and fatalities per mile of operation than semis. Although the BMCS study did not control for certain potential biases, the results of the studies with more controlled conditions suggest no bias sufficient to distort the outcome of this very large study. (A. 304-305)

2. CF accident statistics, 1970 through 1978. (A. 608) For the nine years, the data showed twins to be significantly below semis in accident rates with no significant difference in injury or fatality rates. (Tr. 413-414)

42. A California Highway Patrol Study and the "Reiss Study" (also known as the "BioTechnology" or "Bio-Tech" Study, properly titled "Comparison of California Accident Rates for Single and Double Tractor Trailer Combination Trucks") were so defective that CF highway safety expert, Dr. Glennon, concluded that they should be disregarded. (A. 295) Dr. Koehler, Appellants' statistical expert, concurred. (A. 489-490) Appellants properly make no mention of the former; their attempt to now revive the "Reiss Study" is discussed at page 39, infra.

3. Detailed analysis of CF's 1978 accidents (CF Ex. 11, Tr. 375; CF Ex. 12, Tr. 375; CF Ex. 13, Tr. 375; CF Ex. 18, Tr. 486; and A. 607-613)

   In 1978, CF's semis had 2% more accidents, 27% more injuries, and 82% more fatalities per mile of operation than CF twins. The 1978 CF data was analyzed extensively for biases and was found to contain no bias favoring twins (A. 610-613).

4. A "Matched Pair Analysis" which compared CF semis and twins operating over 112 million miles under identical conditions. (CF Ex. 14, Tr. 375; CF Ex. 15, Tr. 375; and CF Ex. 16, Tr. 375)

   The study was controlled for all potential biases. The result showed no significant difference in accident, injury, or fatality rates, although semis had a markedly higher injury rate. Appellants' own statistical expert, Dr. Koehler, testified that he believed the matched pair analysis provided "moderately strong" evidence that semis cause more injuries than twins. (A. 487-488)

The studies vary in sample size, degree of control of variables, and statistical reliability. They were subjected to extensive scrutiny, examination, and testimony of experts as to possible biases, inaccuracies, or problems. In total, they provide solid support for expert opinions on the safety of 65-foot twins.

The District Court's findings reflect its sensitivity to possible biases in the statistics. The Court placed particular reliance on CF's accident statistics and the "Matched Pair Analysis." 475 F.Supp. 544, 549 (J.S. 21a).

These two statistical studies are highly credible. CF's 1978 accident data provides a large statistical base. (A. 288-290, 299-304, 610-613) The data was admitted by Appellants to be accurate and complete.[43] Dr. Koehler speculated that biases

43. "Factual Statements and Responses of Plaintiff and Defendants," Document No. 26, Statement Nos. 335 and 336.

might exist, such as driver, maintenance, or road-type differences. He knew of no facts to support his speculation. The alleged biases were examined either by detailed data analysis or the testimony of witnesses familiar with CF's operations. The alleged biases were disproved. (A. 362, 610-613; Tr. 745-746) The "Matched Pair Analysis," though based on a small sample, was totally controlled to avoid bias.[44]

These statistical studies do not constitute the entire safety case and, given the nature of statistical evidence, should not. Every credible statistical study did conclude that twins were either as safe as, or safer than, semis. (A. 608) The District Court was fully justified in deciding that the statistical studies were congruent with other sources of expert evidence and supported its conclusion as to overall safety.

Highway Safety Analysis. To address overall safety, Dr. John Glennon, a nationally recognized authority on highway safety, performed a three-stage analysis of the safety of 65-foot twins. He conducted an extensive search and analysis of the literature available, numerous analyses of available accident data, including computer analyses of CF's data, and developed analytical methods to eliminate possible biases in accident data. (A. 289-290, 609-613; CF Ex. 18, Tr. 486; CF Ex. 19, Tr. 375; CF Ex. 20, Tr. 375; and, CF Ex. 21, Tr. 486) He concluded that twins were certainly as safe as semis. (A. 289, 304)

Dr. Glennon's opinion as to the relative overall safety of twins is in stark contrast to the inability or unwillingness of any of Appellants' experts to express an opinion on relative overall safety of the vehicle.

There was one safety conclusion by Dr. Glennon with which everyone agreed: added miles required to circumvent Iowa because of the Iowa ban result in a greater number of accidents, injuries, and fatalities than would result if 65-foot twins were permitted on Interstates in Iowa.[45] (A. 305-306, 614; Tr. 480-

44. A. 476-477; Tr. 1788-1789; 475 F. Supp. 544, 554 (J.S. 33a)

45. Appellant Kassel, Director of the Iowa DOT (A. 270-271); the Iowa

. . . (Continued on Page 33)

482) This fact was without dispute, and the Court finally cut off further questions on the subject as being repetitious.[46]

B. Appellants' Attack on the Factual Findings Relies on Isolated Segments of the Record Which Themselves Fail to Support Appellants' Contentions.

Appellants do not frontally attack the validity of the District Curt's findings. To support their position, Appellants make assertions about the facts on five subjects: passing, intersections, backing, jackknives and upsets, and accident and fatality rates, Appellants' Br. 5, 26-27. Appellants cite "facts" without regard to context. They disregard elaborations and qualifications by the witnesses, impeachment, concessions on cross-examination, and other evidence of record. Appellants not only depart from but effectively abandon any acknowledgment that factual findings be on "the entire evidence." *Zenith Corp. v. Hazeltine*, 395

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45. . . . (Continued from Page 32)
DOT Study (CF Ex. 2, p. 25, Tr. 107-108; A. 604); Col. Edward Dickinson, Chief, Iowa State Patrol (A. 402); Kenneth L. Pierson, Deputy Director, Bureau of Motor Carrier Safety, Federal Highway Administration (A. 25); Ernest G. Cox, retired Deputy Director, Bureau of Motor Carrier Safety, Federal Highway Administration (A. 44); George E. Moberly, Engineer of Traffic, Illinois DOT (A. 63-64); Arland V. Hicks, Transportation Safety Administrator, Kansas Department of Transportation (A. 71); Thomas D. Doyle, former Director — State Engineer, Nebraska Department of Roads (A. 83-84); John Nimmo, Iowa DOT (A. 250); Fred J. Myers, Professional Engineer (A. 117-118).

46. Professor Robert L. Carstens, professor of civil engineering, Iowa State University (defense witness):

"Q. Would you agree with the proposition that reduction in number of miles tends to reduce exposure to accidents, generally?

A. A reduction in the number of miles a vehicle travels tends to reduce exposure to accidents?

Q. Yes, sir.

A. Yes, I would agree.

Q. And would you agree that the interstate system would generally be a safer facility on which to operate —

THE COURT: Mr. Varda, let's not get into these things that there doesn't seem to be any question about, because that is repetitious. If you want to get into an area — But going over with every witness matters that don't seem to be in issue is what I mean by repetitious." (A. 462)

U.S. 100, 123 (1969).[47]

Passing. Appellants' assertions rest solely on the testimony of Appellants' witness Peters. Appellants' Br. 5, 26. (A. 504-505) Dr. Peters' testimony regarding the significance of the additional ⅓ of a second required to pass a 65-foot twin, particularly in adverse weather, was based on his off-hand personal observations.[48]

The evidence contrary to Dr. Peters' testimony is extensive and demonstrates that the slight difference in passing time and distance is not significant to safety, particularly on Interstates.[49] The 1975 Iowa DOT Study concluded:

> "The data shows that a slight increase in length has no significant impact on the passing distance." (A. 591)

The District Court could properly disregard Dr. Peters' testimony.[50]

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47. Appellants believe they need only make a colorable argument. Appellants' Br. 17. *Contra*, 612 F.2d 1064, 1069 (J.S. 6a).

48. The District Court found Dr. Peters not entitled to express an opinion on splash and spray other than that of a layman. 475 F.Supp. 544, 554-555 (J.S. 34a). Splash and spray characteristics vary with vehicle types. Twins produce 20% less than semis. These findings have been verified by a number of research agencies. (A. 95-97; Sherard Depo. Ex. 2 and 3)

49. Without exception present and former governmental officials who are familiar with 65-foot twin operations found no effect on passing safety, particularly on Interstates: Adkins, Kansas Highway Patrol (A. 68); Crawford, Minnesota Highway Patrol (A. 57); Doyle, Nebraska Highway Department (A. 83); Eisnach, South Dakota Highway Patrol (A. 88); Gilles, Kansas Turnpike Authority (A. 232); Hicks, Kansas DOT (A. 72-73), Kynaston, California Highway Patrol (A. 51-53); McCamment, Kansas Highway Commission (A. 76, 79); Pierson, U.S. DOT, Bureau of Motor Carrier Safety (A. 25). The engineering evidence concurs with their opinions, see footnote 40, above. In reality, as a result of continued acceleration during passing, the actual differential is smaller than that calculated. (A. 102-103; Tr. 1126-1127)

50. In *Raymond*, Wisconsin similarly asserted that passing longer trucks poses obvious hazards, paticularly in adverse weather, arguing that, "the safety factors are obvious." This Court found the Wisconsin ban to provide only ". . . the most speculative contribution to highway safety." 434 U.S. 429, 447 (1978).

Intersections. Appellants rely solely on a portion of the testimony of Prof. Carstens. For his testimony in this proceeding, Prof. Carstens designed a special methodology to measure and compare the very small time differences required for 60-foot and 65-foot vehicles to cross a selected type of intersection. (Tr. 1549-1551) The methodology required the unrealistic assumption of random entry and uniform acceleration into various assumed levels of traffic flow.[51]

The difference to which Prof. Carstens attached the greatest significance required an extremely heavy hypothesized traffic flow of 2,000 vehicles per hour. (Tr. 1537) Under his assumptions, a 60-foot vehicle could not cross the hypothetical intersection for one week; a 65-foot vehicle, for 10 days.[52] After detailed review and discussion, the District Court found that Prof. Carstens' ". . . charts, tables and plats were all interesting but of little practical value." 475 F.Supp. 544, 555 (J.S. 35a).

Placing Appellants' claims in context destroys the illusion of concern for intersectional safety. Interstates do not have intersections; only those intersections affected by access to Interstates are at issue. Most intersections in Iowa are narrower than Prof. Carstens' hypothetical intersection. (Tr. 1578) For most tighter intersections, the superior maneuverability of both 60 and 65-foot twins provides an edge over 55-foot semis.[53] Iowa permits 65-foot twins at all intersections within the commercial zones of its border cities. Finally, as Prof. Carstens conceded, exposure to the type of accident about which he expressed concern is far greater on two-lane facilities, such as CF's route

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51. A. 453. The limited field observations from which Prof. Carstens extrapolated his comparative data showed a variation of 1,288% in actual acceleration times. (Tr. 1611-1612) Prof. Carstens conceded that acceleration varies with driver reaction to traffic flow and that the small time differences which he attempted to compare disappear with minor differences in acceleration. (Tr. 1607-1610)

52. The difference is calculated from Prof. Carstens, Tr. 1534-1538, A. 457-459.

53. Iowa DOT Study, CF Ex. 2, pp. 61-62, Tr. 107-108; Appellant Kassel, A. 274.

around Iowa via U.S. 36 in Missouri, than on Interstates in Iowa. (Tr. 1555-1556)

Backing. Appellants' concern rests solely on a portion of the testimony of Col. Dickinson, Chief of the Iowa State Patrol, Appellants' Br. 5, 27. (A. 399-400) Col. Dickinson conceded that all of the problems addressed in his testimony other than backing are problems associated with large trucks generally. (A. 403) His testimony was typical of efforts of the defense to confuse the issue of the safety of 65-foot twins with that of other vehicles. Col. Dickinson had no opinion as to the relative safety of 55-foot semis and 65-foot twins. His concern with backing was his *only* safety concern with either 60-foot or 65-foot twins. (A. 403)

Col. Dickinson's concern with backing was entirely and admittedly speculative and related to vehicle configuration, not length. He had the same concern with 60-foot twins.[54] (A. 403) Col. Dickinson did not know how far a twin can be backed, but conceded that backing capability sufficient to clear an accident would negate his concern. (A. 404)

Other evidence demonstrates that twins can be backed sufficiently to clear an accident in a critical situation.[55] No witness testified that backing is an actual problem. Furthermore, Appellants' asserted concern finds no application in practice since in this regard 60-foot twins are the same as 65-foot twins and are permitted on all highways in Iowa. The District Court's findings are consistent with Col. Dickinson's entire testimony and other evidence on the subject.

Jackknives and Upsets. The District Court's entire findings on this subject, cited only in part at pages 4-5 and 28 of Apellants' brief were:

> "Twins and semis have different characteristics. Twins are more maneuverable, are less sensitive to wind, and

54. Compare Appellants' brief, pp. 7-8 stating Iowa's sole concern to be length.
55. The Virginia Twin Trailer Study, CF Ex. 71, p. 81; A. 103.

> create less splash and spray. However, they are more likely than semis to jackknife or upset. They can be backed only for a short distance. The negative characteristics are not such that they render the twin less safe than semis overall. Semis are more stable but are more likely to 'rear end' another vehicle.
>
> * * *
>
> "There is an indirect relationship between maneuverability and stability. The more maneuverable a vehicle is, the less stable it becomes. In the case of semis, some maneuverability has been sacrificed for greater stability. In the case of twins, some stability has been sacrificed for greater maneuverability. These choices do not mean that either vehicle is unsafe or that one is less safe overall than the other." 475 F.Supp. 544, 549, 555 (J.S. 21a, 35a).[56]

Appellants attempt to relate the District Court's findings to CF's statistics which show many more jackknives and upsets for twins than semis. Jackknives and upsets are closely related to ice and snow conditions, to which CF twins have greater exposure than do CF semis. (A. 302-303, 316-317, 357-359) Not surprisingly, experts for both CF and Appellants attributed this large variation to differences in weather exposure: twins operate more miles under adverse weather conditions. (A. 316-317, 493-494)

Experts testified that the actual difference in jackknifing was

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56. Appellants raised the issue of stability by presenting evidence concerning stability of a unique Michigan double tanker vehicle, but no comparison among the types of vehicles involved in this proceeding. (A. 134, 534-538) Appellants' expert argued that this evidence was germane because no data was available on 65-foot van-type twins. (A. 530-531) CF's rebuttal witness Walgrave had actually been involved in testing of stability characteristics of articulated vehicles while an employee of the Illinois Institute of Technology Research Institute. The testing included measured dynamic tests of 65-foot twins and 55-foot semis operating through emergency maneuvers, which were used to refine and validate computer models. (A. 561-566) He testified that 65-foot twins are slightly less stable but are more maneuverable than 55-foot semis, and that both vehicles are adequately stable. (A. 566-567)

of no practical significance. After years of winter tests of articulated vehicles on slippery surfaces, Dr. A.E. Easton, former Chairman of the Committee on Winter Driving Hazards of the National Safety Council, reported in his 1972 paper, "Jackknifing of Articulated Vehicles on Slippery Surfaces": "The general conclusion then is that the safety of the 55-ft. tractor semitrailer and the 65-ft. twin-trailer combinations is not significantly different." (A. 153) State officials from Minnesota and South Dakota, which suffer harsh winter conditions, indicated no handling problems with 65-foot twins in ice and snow. (A. 59, 88) A California official made a similar observation about twins operating in severe weather in the Donner Pass area. (A. 50)

The District Court correctly found some difference in characteristics between twins and semis and could ascribe some part of the gross difference in accident types to that difference. It regarded the difference to be of no practical significance, since the reason is a design trade-off which favors twins with greater maneuverability. (A. 562-563) Semis have more accidents in categories other than jackknives — rear-end collisions, turning accidents, passing accidents. Jackknives rarely cause injuries, whereas the type of accidents more common to the less maneuverable semis often involve other vehicles and result in injuries. (A. 301-302, 306-307; CF Ex 18, pp. 9-10, Tr. 486)

The District Court's conclusion is also confirmed by the fact that the 60-foot twin, less stable than either the 55-foot semi or the 65-foot twin, was described by Appellant Kassel as a very safe vehicle. (Tr. 139, 240; *compare*, A. 571) In terms of both stability and maneuverability, a 65-foot twin thus falls between two vehicles recognized by Iowa as safe.

Accident and Fatality Rates. Appellants claim to have offered "additional studies" and data from CF's own records which "raised questions" about whether twins had higher fatality rates and more frequent accidents in which property damage occurred, Appellants' Br. 4. In these references, Appellants' abandonment of propriety in recounting the facts to this Court is complete.

The "additional studies" are a single report, known as the "Reiss Study."[57] Experts for both Appellants and CF found the Reiss study so faulty that it should be disregarded. (A. 295, 489-490) Both the principal author and the federal official responsible for overseeing preparation of the study would not vouch for its accuracy nor sponsor it to a court as a measure of relative safety of 65-foot twins and 55-foot semis. (A. 205-206, 225-226)

The Reiss study calculated accident, injury, and fatality rates for twins and semis based on 1974 California Highway Patrol accident data. Mileage was based on vehicle counts at weigh stations on rural and urban highways. A higher proportion of the total semis than the total twins was counted at the urban stations. The California Highway Patrol accident data, however, was almost entirely (98%) from rural highways. Semis were accorded miles of exposure on urban roads, on which no accidents could be reported. As a result, the semi accident, injury, and fatality rates were understated. This bias was first noted by Dr. Hedlund of the National Highway Traffic Safety Administration prior to this proceeding. (Tr. 520) Experts Glennon for CF and Koehler for the Appellants concurred in Dr. Hedlund's criticism. (A. 295, 489-490) Removal of the bias by using only the rural counting stations gave results showing no significant differences between semis and twins. (A. 214, 308-309; Tr. 520-522)

Appellants' second reference, principally to Appellants' Exhibit 546, "Comments on Road Accidents Reported by Consolidated Freightways in 1978," (A. 668-675) sponsored by Dr. Koehler, is more remarkable for its dissimilitude. Dr. Koehler

57. Appellants assert that they showed the generally safety case to be inconclusive, pointing out flaws in statistical studies and introducing their own studies. Appellants' approach to this statistical evidence is at best disingenuous. They assert that many of the studies are defective and that they produced studies showing twins to be less safe than semis. Both statements are true, but closely connected. As the experts *on both sides agreed*, the studies which Appellants rely upon to show twins to be less safe were the defective ones.

"raised questions," but he also put them to rest. At trial, Dr. Koehler effectively disowned his own exhibit.

In Exhibit 546, Dr. Koehler used a dollar cut-off for the accident count. Both he and Dr. Glennon agreed that such cut-offs bias the statistics against twins.[58] An accident of the same magnitude will generate more dollar damage to a twin than a semi.

In addition, apparently as a result of outside instruction to Dr. Koehler, the semi accident rate calculation in Exhibit 546 excludes accidents involving "broken down doubles" (short semis) but includes their mileage as semi miles. (Tr. 1743-1745) The result, as Dr. Koehler conceded, is to understate semi accident rates in numerous tables in Exhibit 546. (Tr. 1742-1747) Acting on the advice of counsel, Dr. Koehler excluded from Exhibit 546 any comparisons of accident types favorable to twins. (A. 492-493)

Exhibit 546 warns of the very "manipulations" of accident data, by choice of reporting criteria or categorization, of which the exhibit is guilty. Dr. Koehler forthrightly admitted his exhibit was not a fair comparison and that rates shown are "not very meaningful." (Tr. 1678) Dr. Koehler also confirmed that CF had not "manipulated" any data. (Tr. 1734-1735, 1771)

Conclusion. The "facts" cited by Appellants to support Iowa's ban of 65-foot twins do not even make the "colorable" showing they posit. Although Appellants hotly contest each evidentiary issue and refuse to concede any material matter, no legitimate local interest beyond the speculative or illusory has been advanced. The claims of support in the evidentiary record now advanced by Appellants only illustrate the soundness of the District Court's findings.

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58. Dr. Glennon, (A. 298-299); Dr. Koehler, (A. 491). The record includes extensive foundation: (Tr. 417-422, 428-429; CF Ex. 46, pp. 1-2, Table L-3, Tr. 1033; CF Ex. 18, pp. 5-8, 10, Tr. 46) In 1978, a cut-off of $250 damage to CF equipment would result in counting 53% of the twin but only 38% of the semi accidents. In 1978, CF semis had a higher percentage of injury and fatality producing accidents than did CF twins.

The absence of legitimate substance to Appellants' safety objective in banning 65-foot twins becomes all the more apparent in the full context of Iowa's vehicle size regulations.

IV. DISCRIMINATION.

The determination of whether safety advantages outweigh economic costs is a political determination. Though this Court has consistently reserved the power to strike down overly burdensome safety regulations,[59] in general it has relied upon the local legislative process to do so, particularly in highway matters. The Commerce Clause's proscription against discrimination is assumed to ensure that the state legislature will be forced to balance both state and national benefits and harms:

> "The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse." *South Carolina State Highway Department v. Barnwell Bros., Inc.*, 303 U.S. 177, 187 (1938).

Even absent legislation that creates exceptions favoring domestic interests, it is questionable whether that assumption is workable where, as here, the burden falls almost entirely on out of state interests. The question of the more general truth of the assumption, however, need not be reached in this case because Iowa exhibits a pattern of exempting state interests from the burden of its length limit.

In *Raymond*, this Court stated that exemptions undercut the "presumption of validity" accorded the state regulation.[60] If that means the exemptions destroy the strong presumption of validity, the reasoning is wrong. The strong presumption of validity serves to protect the safety interest, and the inconsis-

59. E.g. *Seaboard Air Line Ry. v. Blackwell*, 244 U.S. 310 (1917).
60. *Raymond v. Rice*, 434 U.S. 429, 446-447 (1978).

tency of the state should not end that protection. Whether the regulation promotes safety is a matter of fact, and the actions of the legislature do not change facts.

What is undercut is the presumption that state judgment as to the balance between local safety and local economic cost will also serve as a reasonable balance between national safety and national cost. Where the state creates an exemption, it is concluding that the safety advantage, if any, is trivial. That judgment should stand alike for interstate and local interests.

The most telling exemption in this case is the border city exemption, under which 65-foot twins are routinely operated to bring goods into or out of Iowa's border cities.[61] No restrictions are placed on their movement, and they are able to operate on urban Interstates, two-lane roads, and city streets. The exemption secures for many of Iowa's manufacturers the advantages of 65-foot twins, while avoiding the disadvantages of allowing through twin traffic of little benefit to Iowa. The exemption traduces the claims raised in Appellants' brief. If Iowa's concern is intersection maneuvers, Iowa permits 65-foot twins on roads and streets that have far more intersections than the interstate. If the concern is passing, Iowa permits 65-foot twins on two-lane roads where passing would be far more hazardous. If the concern is backing, Iowa permits 65-foot twins on congested city streets and two-lane roads where the necessity of backing is more likely than on an Interstate. Viewed as a whole, the exemption demonstrates that the Iowa Legislature regards the safety hazard of the vehicle, if any, to be clearly outweighed by economic interests.

Appellants respond by asserting that there is no evidence in the record that the border city exemption mitigates any hardships of Iowa businesses and that the exemption benefits interstate movement. Appellants are apparently unaware of the record and the law.

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61. Section 321.457(7), Iowa Code (1979). (A. 618) The actual Exemption is for the "commercial zone" of a city. This normally includes nearby areas for which the city serves as a commercial center.

Extensive testimony, largely uncontradicted, shows that aside from shipping rates, shippers able to use twins enjoy faster long-haul service, faster pickup and delivery, and lower exposure to freight loss and damage. Moreover, the record shows that economic benefit to Iowa shippers was the impetus for the border city exemption. In early 1974, the Governor vetoed House Bill 671 which permitted 65-foot twins on all roads in Iowa. In his veto message, the Governor stated:

> "I have heard many arguments in favor of and against this particular piece of legislation. Early in this session, in my special energy and transportation message to the General Assembly, I said there would be '. . . some value both to Iowa industry and to energy efficiency if additional length only could be utilized by trucks originating at, or destined to, points in Iowa.'
>
> "Then, as now, I find sympathy with those who are doing business in our state and whose enterprises could gain from increased cargo carrying ability by trucks. However, with this bill, the Legislature has pursued a course that would benefit only a few Iowa-based companies while providing a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens." (A. 626)

The legislature passed the border city exemption shortly thereafter.

Appellants simplisticly suggest that because shipments to and from Iowa are interstate, there is no discrimination. Laws which achieve advantages for one state's interstate commerce, over the interstate commerce of other states, are perhaps more repugnant to the Commerce Clause than laws that favor a state's interior commerce.[62]

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62. In effect, the border city exemption is similar to Wisconsin's interplant permit exemption in *Raymond* which permitted the use of oversize vehicles between Wisconsin plants and from the plants to the state line. 434 U.S. 429, 446 n. 24.

The District Court did not state the border city exemption to be directly discriminatory. The court stated that the exemption ". . . is consistent with the state policy of protecting its highways and citizens from additional twin traffic across the state." 475 F. Supp. 544, 552 (J.S. 29a). That policy, the District Court had earlier stated, "has the aura of protectionism usually associated with discrimination against interstate commerce." 475F. Supp. 544, 551 (J.S. 26a).

As Wisconsin did, Iowa has a number of other exemptions expressly limited to activities benefiting Iowa.[63] In Wisconsin, a Wisconsin manufacturer of twins could haul them in tandem out of the state. So may an Iowa manufacturer.[64] In Wisconsin, Wisconsin manufacturers of mobile homes could haul oversize units in the state. In Iowa, mobile homes 60 to 85 feet in length and from 12 feet 5 inches to 14 feet 5 inches may be moved, but only if the destination or origin is in Iowa and only for an Iowa resident.[65] As the Governor stated in vetoing a prior bill that would have allowed oversize mobile homes to be moved regardless of whether for Iowa's benefit:

> "This bill also would make Iowa a bridge state as these oversized units are moved into Iowa after being manufactured in another state and sold in a third. None of this activity would be of particular economic benefit to Iowa." (A. 641)

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63. See *Raymond v. Rice*, 426 U.S. 429, 446-447, 450 (1978). Iowa, like Wisconsin, also issues numerous "over dimension" permits. In 1977, Iowa issued 9,295 annual and 41,531 single trip permits. Unlike Wisconsin, Iowa does not even require permits for vehicle transporters. Section 321. 457(5), Iowa Code (1979). (A. 618)

64. Section 321E. 10, Iowa Code (1979). (A. 618) Manufacturers may move 65-foot twins for export on four-lane and two-lane roads, though Iowa restricts them from narrow two-lane roads and limits their speed. If a vehicle is 65 feet or less in length, it is exempted from carrying special warning signs or devices, §321.24, Iowa Code (1979). (A. 621)

65. Section 321E.28, Iowa Code (1979). (A. 619) Appellants, in their brief, only listed exemptions contained in §321.457, Iowa Code (1979), Appellants' Br. 20.

Appellants contend that length and not configuration is the issue here. If so, Iowa's exemption for loaded vehicle transporters 65 feet in overall length suggests that the safety concern for length is minimal when there is a burden on Iowa consumers.[66]

V. THE BURDEN IMPOSED ON INTERSTATE COMMERCE.

A. The Commercial Burden.

CF responds to the Iowa ban in ways very similar to those necessitated by Wisconsin's ban.[67] Freight that would normally pass through Iowa is either diverted around the state or is transported in 55-foot semis rather than 65-foot twins. Freight originating in or destined to Iowa, other than border cities, is transported in semis or shuttled after splitting 65-foot twins at Iowa's borders.[68] The methods of coping with the ban result in significant delays, added exposure of the freight to damage, increased equipment incompatibility, interference with equipment interchange, and added costs. None of these factors are confined to Iowa. Indeed, because Iowa blocks the transcontinental route connecting the industrial East and Midwest with the West, most of the burden is imposed on through traffic having little connection with Iowa.[69]

Appellants' response to the monetary burden is to assert that it is insignificant and that it is the result of a voluntary business decision by CF to use 65-foot twins rather than 60-foot twins or

66. Appellants now contend that there is no evidence that the 65-foot vehicle transporter is a benefit to anyone in Iowa. But see, "Factual Statements and Responses of Plaintiff and Defendants," Document No. 26, Statements 381-383.

67. *Raymond v. Rice*, 434 U.S. 429, 438-439 (1978).

68. Generally, CF uses twins for East-West traffic, diverting them around Iowa and uses semis for much of its North-South traffic. For traffic to and from Iowa, it uses semis or shuttles standard twins, singly between Iowa terminals and border staging areas. CF attempted in the past to use 60-foot combinations (consisting of a standard twin tractor, a standard twin trailer, and a shorter nonstandard trailer) for Iowa destinations and origins, "capturing" the short trailers at the first major terminal outside of Iowa, reshipping the freight and holding the short trailer for dispatch into Iowa. It found that practice infeasible and decided not to continue it, phasing it out as the equipment is retired. (A. 353-356)

69. See, generally CF Ex. 32, Tr. 927 and 46, Tr. 1033.

55-foot semis. The arguments are insupportable.

B. **Significance Of The Monetary Cost.**

Monetary cost, standing by itself, is not normally a sufficient basis for invalidation of a state regulation, though it is a relevant factor, *Raymond v. Rice*, 434 U.S. 429, 445 n. 21 (1978). In their brief, Appellants have largely ignored the unquantifiable but very real burden on CF's operations and service. They focus instead on the dollar figure proven by CF to be the minimum cost. Even that figure is large,[70] and Appellants resort to misleading comparisons in an attempt to minimize it.

Appellants concede the minimum monetary cost of Iowa's ban to CF and its customers but assert that the cost is insignificant as it amounts to one-third of one percent of CF's total costs, Appellants' Br. 38. The artifice is in the basis of comparison. CF's total revenues are derived from operations in 48 states, many of which are minimally or not at all affected by Iowa's ban. Under Appellants' theory, to "properly" apportion the cost burden, the cost of Iowa's ban must be divided by the cost of shipments between Seattle and San Diego, between Chicago and Minneapolis, and other points on CF's system despite absence of any contact with Iowa.

As support for their comparison, Appellants cite this Court's calculation of the added cost to a barrel of oil imposed by Washington's escort tug requirement in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 187 n. 9 (1978). *Ray* offers no such support. If Appellants' basis of comparison had been applied in *Ray*, the escort tug cost would have been spread over the cost per barrel

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70. Here, the quantified burden on CF, $2,004,113, is slightly less than the $2,050,081 estimated burden on CF of the Wisconsin ban. Appendix page 375, *Raymond v. Rice*, 76-558. The Wisconsin estimate was based on 1974 costs. Inflation and increased fuel costs have removed much of the cost difference referred to in the footnote quoted in Appellants' Brief at 39 to 40.

of every voyage throughout the world.[71] See also 475 F. Supp. 544, 547 n. 2 (J.S. 18a).

Because Iowa's ban has a gradually diffusing effect through many parts of the national system, it is difficult to precisely pinpoint the proper basis of comparison. Many of the economic effects are impossible to quantify, others are difficult to precisely identify. The most direct comparison is the simple cost of moving goods around rather than through Iowa. The diversion increases the mileage for that segment of the journey by 32%, increasing the direct vehicle operating costs by the same factor.[72] Because the ban necessitates additional reshipping and freight handling, the total increased cost is greater.

C. **The Burden Is Not Voluntarily Incurred.**

Appellants assert that the burden imposed by the Iowa ban is "voluntary." In a sense it is. Banned from using 65-foot twins through Iowa, CF is left with several "voluntary" alternatives: (1) operate semis; (2) operate 60-foot twins; (3) shuttle twins through Iowa; and (4) divert 65-foot twins around Iowa. As might be anticipated, CF uses a mixture of the alternatives which attempts to minimize the effects of Iowa's ban. (A. 354-356)

assert that there would be no burden if CF merely chose to use 60-foot twins throughout the Midwest or Nation, Appellants' Br. 34. Appellants apparently overlook the fact that doing so would remove CF from the transportation system. Sixty-foot twins cannot be interchanged, do not meet any industry standard for general commodity equipment, and are not used anywhere in the country outside of Iowa other than to a slight extent in adjoining states for Iowa traffic.[73].

71. The major distinguishing factor between this case's burden and *Ray's* is that in *Ray* no significant impediment was placed on interstate commerce other than the monetary cost. Here, Iowa's ban seriously impedes and disrupts interstate commerce, imposing significant non-monetary burdens.

72. A. 604. On the same basis, using only direct vehicle operating costs, Iowa's DOT calculated the cost to all carriers, based on 1975 costs, to be $12,644,000 annually. (CF Ex. 2, p. 111, Tr. 107-108)

73. A. 23, 155-157, 247, 276-277, 353, 354. CF interline and interchange is important. (A. 360-361; CF Ex. 32, p. 19, Tr. 927)

Appellants suggest that CF should use semis, citing Roadway Express, Inc., as an example. Although the largest general commodity carrier, Roadway has been an Eastern based regional carrier. Roadway has only recently become a transcontinental carrier. Roadway uses semis because of the legal restrictions in its principal operating area which prohibit twins. (Jones Depo. 3, 8-9, Ex. 1, Maps at pp. 4, 6; A. 375-377) Roadway would use twins if it could legally do so in its principal areas of operation. (A. 236-237) Unlike Roadway, the major transcontinental carriers of small shipments do not have their principal operations in Eastern areas which ban twins and make extensive use of twins. (A. 377; CF Ex. 32, pp. 21-22, Tr. 927)

Use of 55-foot semis or 60-foot twins throughout the general commodity system as a means of responding to Iowa's ban would result in a decrease in the efficiency of the entire system, an increase in shipping costs throughout the country, an increase in the number of vehicles needed to move the freight, and a corresponding increase in accidents throughout the country. (CF Ex. 46, pp. 30-35, Tr. 1033)

To suggest that CF and other carriers "voluntarily" incur the burden of Iowa's ban by not changing the national system to comport with Iowa's requirements is understandable only from a very parochial viewpoint. Ironically, were the general commodity motor carrier industry able to adopt Appellants' suggestion, such vehicles would operate over then unimpeded shorter routes via Interstate highways in Iowa, eliminating the local benefit from reduced traffic.

D. **The Safety Burden On Interstate Commerce.**

The most significant effect of Iowa's ban is to divert twin traffic around the state. The result is a decrease in accidents in Iowa and an increase in accidents in the neighboring states of Illinois, Missouri, and Nebraska. The total increase in accidents exceeds the decrease in Iowa. The increase is attributable to the increased mileage and the fact that diverted traffic travels on

roads that are predominantly two-lane and substantially less safe than the Interstate routes through Iowa.[74]

As stated by the District Court in denying Appellants' Motion for Stay Pending Appeal:

> ". . . under the circumstances the granting of the stay would result in more accidents, more injuries, more fatalities and more fuel consumption, than would occur if the 65 foot twins were operated through Iowa over I-80 and I-35." (A. 579)

The safety burden exists regardless of the measures CF takes to cope with the ban.

CONCLUSION

Iowa's ban of 65-foot twins does not serve any legitimate local public interest. It does not promote safety except in the parochial sense of promoting safety in Iowa by shifting interstate commerce to sister states. It unnecessarily burdens interstate commerce.

The decisions below should be affirmed.

Respectfully submitted,

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74. See footnotes 28 and 45 above.